NO. 90-425 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Bill Armontrout, Warden
Missouri State Penitentiary

Petitioner,

vs.

James W. Chambers,

Respondent.

Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

II.

THE QUESTION OF WHETHER OR NOT AN ATTORNEY'S FAILURE TO INVESTIGATE IS TRIAL STRATEGY IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS ACCORDED STATE COURT FINDINGS OF FACT UNDER 28 U.S.C. §2254(D).

III.

COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND V. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL; SUCH COURTS DO NOT CREATE "PER SE" RULES SIMPLY BY DOING SO.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Respondent hereby corrects and clarifies Appellant's Statement of the case by adding the following omitted facts:

In December, 1982, Respondent was convicted of Capital Murder for shooting Jerry Lee Oestricker outside a bar in Arnold, Missouri. At his 1982 trial, Respondent's counsel called one witness on his behalf. This eyewitness, James Jones, testified that the victim followed Respondent out of the bar, and when Respondent turned to face the victim, the victim hit Respondent in the face, knocking him to the ground. State v. Chambers, 671 S.W.2d 781, 783 (Mo.banc 1984).

The Supreme Court of Missouri reversed Respondent's

conviction, holding that the testimony described above warranted submission of a self-defense instruction to the jury, since such an instruction was requested. Id.

On retrial, Respondent's counsel called no witnesses on Respondent's behalf. He did not interview, nor did he attempt to contact, James Jones. Chambers v. State, 745 S.W.2d 718 (Mo.App. 1987).

The U.S. Court of Appeals For The Eighth Circuit, En banc, reversed Respondent's conviction, holding that trial counsel was ineffective for failure to interview or call James Jones as a witness. (Petitioner's Appendix To Petition For A Writ of Certiorari, A-2 - A-29) (hereinafter referred to as "Petitioner's Appendix").

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

U.S. Supreme Court Rule 10.1 clearly provides that this Court's certiorari review is discretionary, and should be exercised "only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. Petitioner has not shown, nor even alleged, that special and important reasons exist for this Court to exercise its jurisdiction. Petitioner has simply alleged that the decision of the U.S. Court of Appeals for the Eighth Circuit, en banc, is in error.

The case at bar presents a unique set of circumstances, unlike

those in any case cited by Petitioner or Respondent throughout this litigation. Respondent was tried and convicted of capital murder and sentenced to death. His conviction was reversed by the Missouri Supreme Court, and that reversal was based completely upon the testimony of a single witness. State v. Chambers, 671 S.W.2d 781 (Mo.banc 1984). Respondent was retried without the benefit of that witness' testimony, because Respondent's trial counsel failed to contact, interview, or call this witness.

The Eighth Circuit's decision that Respondent's trial counsel was ineffective simply applied to the facts herein this Court's standards as set out in Strickland v. Washington, 466 U.S. 668 (1984). This Court has often pointed out, there is no clear rule as to what constitutes effective or ineffective assistance of counsel. Ineffectiveness in each case must be decided on the basis of its own facts and circumstances. Id. at 688-690. This Court has already set parameters to guide the lower courts in making this determination. Id. These parameters were clearly followed by the Eighth Circuit in Chambers v. Armontrout, No. 88-2383 (8th Cir. July 5, 1990) (En banc) (Petitioner's Appendix, A-2 - A-29), and do not need further clarification by this Court. Strickland v. Washington, supra. It is difficult to see how the Eighth Circuit's decision in this case could have a broad application or importance beyond the unique factual limits of the case at bar.

The purpose of the writ of certiorari is not to correct possible errors made by federal courts of appeal. This Court has held:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the circuit courts of appeal. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955). In the instant case, there is no conflict among the circuits and no principle, important to the public, which needs to be settled by this Court. Therefore, this Court should not grant Petitioner's Petition For Writ of Certiorari.

II.

THE QUESTION OF WHETHER OR NOT AN ATTORNEY'S FAILURE TO INVESTIGATE IS TRIAL STRATEGY IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS ACCORDED STATE COURT FINDINGS OF FACT UNDER 28 U.S.C. §2254(D).

Petitioner claims that the Eighth Circuit has ignored the statutory presumption of correctness accorded state court findings of fact under 28 U.S.C. §2254(D), because it disagreed with the Missouri Court of Appeals' opinion that Respondent's trial counsel's failure to investigate James Jones was deliberate trial strategy.

In fact, the question of whether or not any decision of counsel is strategic is a mixed question of law and fact. Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir. 1989). "The Illinois Supreme Court found that counsel's decision to omit character testimony was a strategic decision. (citation omitted). The state argues that this finding is one of fact, entitled to the presumption of correctness required by 28 U.S.C. §2254(D). We disagree." Id. at

n. 12.

This Court has consistently held that the presumption of correctness applies to "basic, primary or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'" Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) quoting Townsend v. Sain, 372 U.S. 293, 309 (1963) and Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.). There is a material distinction between these types of facts and interpretations of strategy which require the application of legal principles to those facts. Cuyler v. Sullivan, supra at 342.

Courts have held the following questions to be mixed questions of law and fact: whether trial counsel's decision to omit character testimony is trial strategy, Kubet v. Thieret, supra; whether or not an attorney is adequately prepared for trial, Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981); reasonableness of trial counsel's decision to withhold a possible jury instruction, U.S. ex rel. Barnard v. Lane, 819 F.2d 798, 804 (7th Cir. 1987); whether or not an identification witness had an adequate opportunity to view a defendant, Dickerson v. Fogg, 692 F.2d 238, 243 (2nd. Cir. 1982). This litany of cases suggests a uniformity among the circuits rather than a conflict.

If we were only dealing with the questions of whether or not Respondent's trial counsel interviewed witnesses, attempted to contact witnesses, or reviewed transcripts of prior testimony there would be no dispute that the findings of fact are entitled to the presumption of correctness. Cuyler v. Sullivan, supra at 342.

However, whether or not a decision to forego such investigation is trial strategy or an unreasonable limitation on counsel's investigation requires applying legal principles to historical facts. Id.

The parameters set out in Strickland v. Washington, supra, for measuring the effectiveness of counsel's performance, apply with particular relevance to the instant case.

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, supra at 690-691. Characterizing an act or omission as trial strategy puts the stamp of reasonableness on it, and makes it "virtually unchallengeable." However, it is clearly the intent of Strickland that the question of reasonableness is a legal one. The State of Missouri suggests the federal reviewing court can't make that determination, contrary to Strickland. "Ineffectiveness is not a question of 'basic, primary or historical fact' (citations omitted) . . . it is a mixed question of law and fact.'" Strickland v. Washington, supra, at 698.

In the instant case, Respondent's counsel reviewed the transcripts of James Jones' prior testimony, but he did not attempt to contact or interview Jones. He called no witnesses to testify

on Respondent's behalf. These are the historical facts which form the basis for Respondent's complaint of ineffectiveness. Determining whether or not this course of action was reasonable requires applying the law of Strickland to these facts. To hold otherwise would effectively preclude review of ineffectiveness claims, simply by characterizing all unreasonable courses of action as "trial strategy."

The dissent (called "well-reasoned and thorough" by Petitioner, Petition For Writ Of Certiorari, at 16) argues strongly against reversal herein. Yet nowhere in his dissent does Circuit Judge John R. Gibson suggest that the majority opinion somehow ignored the statutory presumption of correctness. On the contrary, Judge Gibson quarrels with the majority's interpretation of reasonableness.

Respondent submits that the Court herein has not ignored the statutory presumption of correctness, 28 U.S.C. §2254(D), and that its decision properly applies the guidelines of Strickland v. Washington, supra. Therefore, this Court should deny certiorari.

III

COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND V. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL; SUCH COURTS DO NOT CREATE "PER SE" RULES SIMPLY BY DOING SO.

In the case at bar, the Eighth Circuit Court of Appeals clearly and unequivocally applied the standards for determining an ineffective assistance of counsel claim as set out in Strickland v.

Washington, supra. See Chambers v. Armontrout, supra.

Petitioner attempts to argue that by ruling Respondent's trial counsel ineffective herein, the Eighth Circuit creates "per se" rules requiring counsel to put forth certain affirmative defenses and to call certain witnesses. Nothing can be clearer than the principle that there are no absolute rules for what constitutes effective assistance of counsel. Strickland, supra at 688. Each case with an ineffectiveness claim must be judged on its own facts and circumstances. Id at 689-690, and that is precisely what was done in this case.

The Eighth Circuit Court of Appeals made a determination, pursuant to Strickland, that Respondent's counsel limited his investigation in a manner not supported by a reasonable professional judgment. (Petitioner's Appendix, A-8). The court makes clear that this decision is unreasonable in view of the unique and cumulative facts of this case. (Petitioner's Appendix, A-8 - A-13).

Respondent never contended that he didn't shoot the victim. Jones was the only person to see the entire altercation outside the bar. Without Jones' testimony, the only picture for the jury was that the victim walked outside the bar and Respondent shot him. Respondent's counsel called no witnesses on Respondent's behalf, yet tried to put forth the defense of self-defense. (Petitioner's Appendix A-11). Yet the Missouri Supreme Court had expressly ruled that Jones' testimony at the first trial justified the self-defense instruction which was not given. (Petitioner's Appendix, A-9).

Furthermore, all of the allegedly damaging portions of Jones' testimony from the first trial were cumulative to the testimony offered by state's witnesses. (Petitioner's Appendix A-10, A-11). Under these circumstances, the Court held, counsel's decision not to even interview this readily available witness was not reasonable. (Petitioner's Appendix, A-13). The court further held that counsel's failure to call Jones was only as reasonable or unreasonable as his decision not to interview Jones. (Petitioner's Appendix, A-13). This clearly follows the parameters of Strickland. Choices made after less than complete investigation are reasonable "to the extent that reasonable professional judgment supports the limitations on investigation." Strickland v. Washington, supra, at 690-691.

If a court is not entitled to apply these standards to the facts of each case without being accused of promulgating "per se" rules, how could any court review an ineffectiveness claim? In that event, if the Eighth Circuit had ruled against Respondent, Respondent could claim the Court was adopting a "per se" rule that attorneys don't have to investigate affirmative defenses in any case where there is a transcript of prior testimony. Once again, these determinations must be made on a case by case basis.

The Eighth Circuit has already held that just because it rules in one case that a failure to interview witnesses constitutes ineffective assistance, it does not adopt a "per se" rule that the same class of witnesses must be interviewed in every case. Langston v. Wyrick, 698 F.2d 926, 931 (8th Cir. 1982). See also

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990).

Petitioner further argues that the Eighth Circuit misapplied the prejudice prong of the Strickland test, however, Petitioner completely misstates the law of the case in the process.

It is not speculation that if Jones had testified, a self-defense instruction would have been given. It is absolutely clear that Jones' testimony from the first trial is the testimony which required a self-defense instruction to be given. State v. Chambers, 671 S.W.2d 781 (Mo.banc 1984). This proposition must be considered the law of the case. Choate v. State Dept. of Public Health & Welfare, 296 S.W.2d 189, 194 (Mo.App.S.D. 1956). If Respondent had been allowed to argue self-defense to the jury, the jury could have found, at least, that Respondent was provoked in such a manner as to justify convicting him on the charge of manslaughter or second degree murder, or could have found this to be a mitigating circumstance at the sentencing phase of the trial. The jury was not only deprived of the evidence that the victim attacked Respondent, they were deprived of the force of that argument on closing statement, that Respondent was provoked in this manner.

It is highly illogical to claim that a jury in a fair trial, given the instructions and closing argument to which the Defendant is constitutionally entitled, will necessarily reach the same result as a jury which is deprived of these instructions and argument. This is how Petitioner argues that Respondent was not prejudiced by counsel's omissions, because Respondent was convicted

by the jury in his first trial. In the instant case, the Eighth Circuit carefully applied the prejudice prong of the Strickland standard to the facts of this case. (Petitioner's Appendix, A-16). The court clearly and correctly followed Strickland, finding that if Jones had testified, there is a reasonable probability that "the result would have been different." Strickland, supra, at 694-695. Petitioner's Appendix, A-16.

Finally, Petitioner claims that this decision creates a conflict with the Fifth Circuit U.S. Court of Appeals' decision in Bell v. Lynaugh, 828 F.2d 1085 (5th Cir. 1987). It is true that Bell dealt with counsel's decisions not to put forth the defense of diminished capacity which had been used in Defendant's prior trial for a related murder. This ignores, however, the crucial point that in Bell there is no suggestion that the jury was not properly instructed as to this defense at Bell's prior trial. In the instant case, the jury was not even allowed to consider the defense put forth, Respondent's only defense, at his first trial.

In addition, in the Bell case, presentation of this defense would bring independently damaging evidence in front of the jury which would not otherwise be at issue. 828 F.2d at 1090. This gives counsel a reasonable basis for his decision not to put evidence of diminished capacity in issue. This is in stark contrast to the case at bar, where the missing evidence directly contradicts the state's evidence, is presented by the only eyewitness to the most important parts of the incident, and where the "damaging portions" of the missing testimony are all things

that were testified to by state's witnesses. This case creates no conflict among the circuits.

The State of Missouri seeks to create chaos of judicial review by requiring the appellate court to apply Strickland, and accusing them of creating a "per se" rule when they do so. Therefore, Petitioner's Petition For Writ of Certiorari should be denied.

CONCLUSION

The Eighth Circuit in this case meticulously set forth the Strickland v. Washington standards for judging an ineffectiveness claim and applied the facts hereto to these standards. For all of the foregoing reasons, the Respondent respectfully suggests that Petitioner's Petition For A Writ of Certiorari should be denied.

Respectfully Submitted,

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